



Patriotic Group Of Companies Ltd v Sewe & 15 others (Appeal E020 of 2024) [2025] KEELRC 886 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 886 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E020 OF 2024
JK GAKERI, J
MARCH 20, 2025**

BETWEEN

PATRIOTIC GROUP OF COMPANIES LTD APPLICANT

AND

- JOHN OGANGO SEWE 1ST RESPONDENT**
- JOHN OCHIENG 2ND RESPONDENT**
- ALLAN MAJWA 3RD RESPONDENT**
- CAROLINE AUMA 4TH RESPONDENT**
- CARSTONE ODHIAMBO 5TH RESPONDENT**
- GEORGE OJOWO 6TH RESPONDENT**
- ALICE AKOTH 7TH RESPONDENT**
- JOHN OKELLO 8TH RESPONDENT**
- WILLICE ONYANGO 9TH RESPONDENT**
- NICHOLAS OKARA 10TH RESPONDENT**
- JACKLINE ATIENO 11TH RESPONDENT**
- CHARLES RAY ONYANGO 12TH RESPONDENT**
- JOHN ORIEDA 13TH RESPONDENT**
- DAVID ODHIAMBO 14TH RESPONDENT**
- CHRISTOPHER WAKHUNGU 15TH RESPONDENT**
- GEORGE OUMA OUNDO 16TH RESPONDENT**



RULING

1. Before the Court for determination is the Applicant's Notice of Motion dated 14th January, 2025 filed under Certificate of Urgency seeking Orders that:
 1. Spent.
 2. Spent.
 3. The Orders made ex parte by the Honourable Court on 28th November, 2024 be vacated, set aside and/or discharged.
 4. The costs of this application be borne by the Respondent/Applicant.
2. The Notice of Motion is expressed under Order 51 Rule I of the Civil Procedure Rules and Section 1A, 1B, 3A, 6, 7 and 63(e) of the *Civil Procedure Act* and is based on the grounds set out on its face and the Supporting Affidavit of Mr. John Ogango Sewe sworn on 14th January, 2025 who deposes that no ground had been demonstrated to warrant a review of the Ruling delivered on 27th November, 2024 and the court is functus officio and cannot consider or sit on an apparent appeal against its own Orders.
3. That the application is res judicata the previous application dated 9th September, 2024 and the Supporting Affidavit merely repeated the averments made in the previous Notice of Motion and Supporting Affidavit dated 9th September, 2024 which were adequately responded to.
4. The affiant further deposes that the application is not grounded on any of the grounds recognized for purposes of review such as discovery of new and important matter or evidence, mistake or error apparent on the face of the record or any other sufficient reason.
5. That the application dated 28th November, 2024 is incompetent, invalid, void and abuse of due process.
6. In response, the appellant/Applicant filed a Preliminary Objection dated 12th February, 2025 contending that the order made on 28th November, 2024 have since been executed by issuing stay of execution orders in place.

Applicant's submissions

7. The applicants combined submissions for the applications dated 28th November, 2024, 9th January, 2024 and 14th January, 2025 to address the issues of review res judicata and the doctrine of functus officio.
8. While the application dated 28th November, 2024 was a review application and the application dated 9th January, 2025 was covered under res judicata, no specific aspect of the submissions address the issue of setting aside of ex parte Orders which is in the pith and substance of the instant application.
9. Be that as it may, the applicant's counsel submitted that the application is tenable to the extent that it seeks the discharge of the Interim Orders made on 28th November, 2024.
10. Counsel further posited that the said Orders lapsed on 27th January, 2025 as the duration for depositing the security lapsed and no extension was granted for want of justification for the delay.



Respondent's submissions

11. As to whether the application dated 28th November, 2024 is res judicata counsel submitted that the principle of res judicata under Section 7 of the Civil Procedure Act may be pleaded by way of estoppel to ensure that litigation comes to an end and is typically pleaded as a defence.
12. Reliance was placed on the sentiments of the Court of Appeal in IEBC v Maina Kiai & 5 Others [2017] eKLR.
13. That the purpose of review was for the court to enlarge time to deposit the decretal sum.
14. On functus officio, counsel relied on the sentiments of the Court of Appeal in Telkom Kenya Ltd v John Ochanda [2014] Eklr for the proposition that a final judgment cannot be re-opened as well as the sentiments of the Supreme Court in Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR to highlight the elements of Res judicata.
15. As to whether the court was rendered functus officio, counsel relied on the sentiments of the Supreme Court in Raila Odinga & 2 OTHERS v Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR to urge that a court becomes functus officio after delivery of the final judgment.
16. On whether the court can review the Orders made on 27th November, 2024, counsel submitted that the provisions of Section 80 of the Civil Procedure Act and Order 45 Rule 2 of the Civil Procedure Act provide for review of judgments and rulings by the court that made them, to urge that it was seeking review of the ruling on matters decretal sum.
17. The singular for determination is whether the respondents Notice of Motion is merited.
18. It is trite law that the Court has wide discretion to set aside ex parte Orders. However, the discretion must be exercised to terms and conditions that advance the cause of justice.
19. See CMC Holdings Ltd v Nzioki [2004] IKLR 173, Branco Arabe Espanol v Bank of Uganda [1999] 2EA 22 Patel v E.A. Cargo Handling Services Ltd [1974] EA 75.
20. In James Kanyiita Nderitu & Another v Marios Philotas Ghika & Another [2016] KECA 470 (KLR), the Court of Appeal cited the sentiments of the Court of Appeal for Eastern Africa in Ali Bin Khamis v Salim Bin Khamis Kirobe & Others [1956] 1EA 195, with approval as follows:
21. On the appeal before us, Mr. Khanna relied on (Craig v Kanseion [1943] 1 ALLER 108 as showing that where an Order is improperly made without serving a person to be affected by it and having a statutory right to be served before it can be made, the order is a nullity in the sense that it must be set aside ex debito justifiae, and that in cases of nullity procedure is unimportant, since the court has inherent jurisdiction to set aside its own Order. I accept these principles as laid down by Lord Greene MR”.
22. See also Esther Wamaitha Njihia & 2 Others v Safaricom Ltd Shah & v Mbogo (7), Wachira Karani v Bildad Wachira [2016] KEHC 6334.
23. The Orders the applicant seeks to be set aside, vacated or discharged were issued ex parte on 28th November, 2024 pursuant to the appellant's Notice of Motion of even date filed under Certificate of Urgency.
24. Worthy of note, the Notice of Motion was filed the day after the appellant's application for stay of execution pending appeal was disallowed for failure to meet the threshold prescribed by Order 42 Rule 6 (2) of the Civil Procedure Rules and was intended to accord the appellant a distinct opportunity and time to provide security as it prosecutes its appeal.



25. Shockingly, the appellant failed to make effective use of the opportunity by inter alia contesting the decretal sum to be deposited.
26. On 28th November, 2024, the Court directed as follows:

That the Applicant shall deposit the decretal sum in an interest earning Account in a reputable bank in Kenya held in joint names of the Advocates for the parties within 45 days failing which the Decree Holder is at liberty to execute the Decree”.
27. This Order, in the court’s view was self-executing and required no court intervention.
28. Clearly, the applicant could only enjoy the temporary stay as long as it deposited the decretal sum within 45 days and having failed to do so, the temporary stay lapsed and the respondent was at liberty to execute the decree.
29. In the Court’s view, there is no Order to set aside, discharge or vacate as it is spent.
30. The upshot of the foregoing is that the applicant’s Notice of Motion dated 14th January, 2025 has been overtaken by events as evidenced by the proclamation by M/s Moran Auctioneers dated 15th January, 2025.
31. The application is disallowed with no Orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 20TH DAY OF MARCH, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COvID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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